In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1050

RICHARD S. HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1956, petitioner, who was then an officer in the Virginia Air National Guard, was eliminated from the United States Air Force aircraft observer (aircrew) training program at Ellington Air Force Base by a faculty board on grounds of flying deficiency.[1]

[1] In 1955, while petitioner was an officer in the District of Columbia Air National Guard, he was eliminated from the Air Force pilot training program at Graham Air Force Base, also on grounds of flying deficiency. In the proceedings below, the Court of Claims found that the Graham faculty board

That action did not affect petitioner's commission as an officer, nor his membership in the National Guard.

Petitioner was present at the proceedings before the Ellington faculty board and stated that he had no objection to the Letter Order appointing the board and did not wish to challenge any member for cause. Petitioner testified in his own behalf and cross-examined his flight commander, who had recommended his elimination from the school. Petitioner did not challenge the faculty board's procedures until more than two years later. In 1958 he filed an application with the Air Force Board for Correction of Military Records seeking reinstatement in flight training, promotion and back pay. Petitioner did not claim that he was qualified to continue the aircraft observer course, or that, had he been permitted to continue, he would have graduated with an aircraft observer aeronautical rating. He claimed only that the faculty board proceedings which resulted in his elimination from the course were a nullity because of certain procedural irregularities. The Correction Board denied the application.

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was not constituted in conformity with the relevant Air Force regulation (AFR 11-1, para. 4) in that one of the board's voting members was junior in rank to petitioner. The Court of Claims held that this defect deprived the board of jurisdiction and that petitioner was entitled to recover accrued pay, including flying pay and allowances, from May 4, 1955, when he was eliminated from the pilot training program, until September 5, 1955, when he entered on active duty for training at Ellington Air Force Base. The petition is limited to an attack on the decision below insofar as it sustains the propriety of petitioner's elimination from the Ellington training program.

Petitioner then brought this action in the Court of Claims, which held that petitioner's claim with respect to the proceedings before the Ellington Board is "without merit" (Slip Op. p. 27). In particular, the Court of Claims found "that the Board was properly constituted; that its findings were more than adequately substantiated by acceptable evidence; that the recommendations were proper, reasonable and fully justified; that the Board proceedings were conducted in substantial compliance with applicable regulations, directives, and statutory law; that none of [petitioner's] rights were substantially prejudiced; and that the action of the Air Force Board for Correction of Military Records in denying [petitioner's] request for correction of his records relating to the Ellington Board proceedings was not arbitrary or capricious" *(ibid.)*.

1. Assuming that the requirements of due process are applicable to the proceedings of an administrative faculty board charged solely with determining whether a student is qualified to continue in a special military course, it is clear here that the petitioner was not denied due process. He had notice of the proceedings and was permitted to appear on his own behalf; he had the right to challenge the members of the board for cause, to introduce evidence and to confront and cross-examine witnesses against him.

2. Petitioner urges (Pet. 8-9) that the presence of the two non-voting members of the board during the board's closed deliberations was violative of his rights. There is, however, no warrant for his contention that either of the non-voting members had the function of

a prosecutor. Furthermore, as the Court of Claims noted (Slip Op. p. 15-16), petitioner "has made no showing that the presence of the recorder and reporter during the closed session of the Ellington Board proceedings violated the provisions of any regulations, directives, or statutes applicable to a faculty board hearing such as the one involved herein, or that their presence was improper or prejudicial to [petitioner's] rights in any manner."

3. Petitioner also urges (Pet. 6-7) that the Ellington Board's proceedings were defective for want of a quorum. There is no basis for this contention. Paragraph 4 of AFR 11-1 required the presence of at least three eligible voting members in those cases in which the appointing order was silent as to the number of members an administrative board was to have. Here, while the appointing order listed eleven officers eligible to vote (and three non-voting officers), it did not designate the number of officers who were to sit on any given faculty board. Since petitioner's board was composed of five eligible voting members, it clearly met the quorum requirement of AFR 11-1. More important, the composition of the board was clearly consistent with the specific regulation governing the procedures of the aircraft observer school faculty board (FTAF Man. 51-4, Oct. 1955, para. 7) which also prescribed a quorum of three voting members.

4. Finally petitioner waived his right to challenge the faculty board's procedures by his failure to object to them at a time when the alleged irregularities might have been cured. More than two years elapsed

between the completion of the board's proceedings and the time petitioner first protested the administrative procedures. In the circumstances, the protest came too late.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

APRIL 1967.

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